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Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1971

No. _____

RAY PALMER - - - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

AND

RAY PALMER and
MAURICE ROBERT HETTICH - - Petitioners

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1971

No. _____

RAY PALMER - - - - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

AND

RAY PALMER and
MAURICE ROBERT HETTICH - - - *Petitioners*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Ray Palmer and Maurice Robert Hettich, ask that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit, made and entered on June 18, 1971, in the Western District of Kentucky.

OPINIONS IN THE COURT BELOW

The trial court, United States District Court for the Western District of Kentucky, found petitioners guilty of violating Section 1955 of Title 18 of the United States Code, Prohibition of Illegal Gambling Busi-

nesses. The United States Court of Appeals for the Sixth Circuit rendered an opinion on March 31, 1972, affirming the trial court. A petition for rehearing was denied on May 30, 1972.

JURISDICTION

The final judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 31, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The petitioners claim that they were deprived of due process in violation of the United States Constitution when seach warrants were issued under Title 18 U.S.C. 1955(c), which requires, by legislative decree, that a search warrant must issue given a certain set of facts presented in an affidavit, and that the enactment of Title 18 U.S.C. 1955 is an unconstitutional delegation of legislative power, violative of Article 1, Section 1 of the United States Constitution.

QUESTIONS PRESENTED

I. Does Title 18 U.S.C. 1955(c) deprive petitioners of their Fourth and Fifth Amendment rights, as interpreted by this Court, when it provides that "probable cause . . . shall be deemed to have been established" for the issuance of search warrants when the affidavits therefor contain the facts enumerated therein?

II. Was the enactment by Congress of Title 18 U.S.C. 1955 an unconstitutional delegation of its power to the States to enact the law, and of its discretion as

to what the law should be, in violation of Article 1, Section 1 of the United States Constitution, as interpreted by this Court?

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Article 1, Section I:

"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article 1, Section VIII:

"The Congress shall have the power . . . to regulate commerce . . . among the Several States . . ."

Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searchers and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Amendment V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

Title 18 U.S.C., Sec. 1955:

"(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal

gambling business should be fined not more than $20,000 or imprisoned not more than five years, or both.

"(b) As used in this section—

"(1) 'illegal gambling business' means a gambling business which—

"(i) is a violation of the law of a State or political subdivision in which it is conducted;

"(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

"(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

"(2) 'gambling' includes but is not limited to pool-selling, book-making, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

"(3) 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

"(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions,

and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established."

STATEMENT OF THE CASE

On November 27, 1970, the Petitioner Palmer was arrested on a warrant issued by a United States Commissioner and charged, with others, with violation of Section 1955 of Title 18 of the United States Code, on premises known as Club Cedar, 421 South 19th Street, Louisville, Kentucky. A search warrant issued November 25, 1970 for these premises was executed and incriminating evidence seized. A search warrant, based on the same affidavit, was also issued for Petitioner Palmer's 1970 Volkswagen and incriminating evidence seized. Petitioner Palmer was not afforded an examining trial and was indicted. The indictment alleged that beginning on or about October 19, 1970 and continuing to and including November 27, 1970, Petitioner Palmer and six other defendants (not parties to this appeal) unlawfully, etc., conducted, managed, supervised and directed an illegal gambling business, a bookmaking and black-jack game business at the Club Cedar and that the business had been in "substantially continuous operation for a period in excess of thirty days, and having a gross revenue of $2,000.00 or more in one or more single days, involving five or more persons in its conduct, management, supervision and direction and being in violation of Kentucky Revised Statutes 436.-200, 436.230 and 436.440."

Petitioner Palmer was subsequently arraigned and entered a plea of "not guilty," putting in issue every material allegation of the indictment. He filed a motion to suppress evidence seized from the premises located at 421 South 19th Street, Louisville, Kentucky, known as Club Cedar and from his 1970 Volkswagen. He also filed a motion to dismiss the indictment and a supplemental motion to dismiss. All of these motions were argued extensively before the District Court on May 17 and 18, 1971. All motions were overruled. The Petitioner Palmer waived trial by jury. A trial was held on June 18, 1971, before the Court without a jury. The only evidence introduced was a stipulation which reads as follows:

In the

DISTRICT COURT OF THE
UNITED STATES

For the Western District of Kentucky
At Louisville

No. 27,580

United States of America - - Plaintiff

v.

Ray Palmer
Maurice Robert Hettich - - Defendants

STIPULATION

It is stipulated and agreed by and between the Defendants, Ray Palmer and Maurice Robert Hettich; Counsel for the Defendants, Frank E.

Haddad, Jr. and Counsel for the United States of America in the above styled case that:

1. The United States of America and the Defendants herein shall use this Stipulation only in the trial of this case and in any appeal taken from any judgment resulting from that trial. The United States of America and the Defendants herein shall not be bound by this Stipulation in any other legal proceeding, civil or criminal, and shall not use this Stipulation as evidence or for the purposes of impeachment in any other legal proceeding, civil or criminal, between these parties. This Stipulation shall be effective only between and among these parties, and no others, including but not limited to the Commonwealth of Kentucky.

2. This Stipulation shall in no way be considered as preventing the Defendants from moving the Court to suppress all evidence seized by reason of the execution of the Search Warrant herein or from contending that the evidence was obtained illegally and in violation of the Defendants' rights under the Fourth Amendment to the Constitution of the United States of America.

3. This Stipulation shall in no way be considered as preventing the Defendants from claiming that Title 18, U.S.C., Section 1955 violates their rights under the Fifth Amendment to the Constitution of the United States of America.

4. This Stipulation shall in no way be considered as preventing the Defendants from claiming Title 18, Section 1955 is otherwise unconstitutional and moving the Court to dismiss the indictment for this additional reason.

5. The Court is to take as true, as if proved by the United States of America beyond a reason-

able doubt, the allegations contained in the indictment herein. However, the Defendants herein still maintain that the facts contained in the indictment do not constitute a violation of federal law.

6. This Stipulation shall be filed and no other or further proof will be received or heard by the Court.

/s/ Frank E. Haddad, Jr.
Attorney for Defendants
529 Kentucky Home Life Building
Louisville, Kentucky 40202
583-4881

/s/ Ray Palmer
/s/ Maurice Robert Hettich
Defendant

/s/ Kenneth J. Tuggle
Asst. United States Attorney
Attorney for the United States
of America

The Petitioner Palmer, during the trial, renewed his motion to suppress evidence seized and the Court considered the arguments made in support of the motion on May 17, and 18, 1971 and in opposition thereto as having been made anew, considered and overruled. The motions to dismiss were likewise renewed and overruled, and an additional ground was argued in support thereof, i.e., that the statute involved and the indictment based upon the statute also violated the defendants' constitutional rights guaranteed by the Fifth Amendment to the Constitution. The Petitioner

Palmer then filed a written motion for judgment of acquittal, which was overruled. The Petitioner was found guilty and prosecuted appeal from the judgment of June 18, 1971.

Also, on November 27, 1970, Petitioner Palmer and Petitioner Hettich were arrested on a warrant issued by a United States Commissioner and were charged, with others, with violation of Section 1955 of Title 18 of the United States Code on premises known as 906 South Fifteenth Street, Louisville, Kentucky. A search warrant issued November 25, 1970, for these premises was executed and incriminating evidence seized. These Petitioners were not afforded an examining trial and were indicted. The indictment alleged that beginning on or about the 19th day of October 1970, and continuing to and including November 27, 1970 that Petitioners Palmer and Hettich and other defendants (not parties to this appeal) unlawfully, etc., conducted, managed, supervised and directed an illegal gambling business, a bookmaking and black-jack game business at 906 S. Fifteenth Street, Louisville, Kentucky, and that the business had been in "substantially continuous operation for a period in excess of thirty days, or having a gross revenue of $2,000.00 or more on one or more single days, involving five or more persons in its conduct, management, supervision and direction, and being in violation of Kentucky Revised Statutes 436.200, 436.230 and 436.440."

Petitioners Palmer and Hettich were subsequently arraigned and entered pleas of "not guilty," putting in issue every material allegation of the indictment.

They filed a motion to suppress evidence seized from the premises located at 906 S. Fifteenth Street, Louisville, Kentucky. They also filed a motion to dismiss the indictment, and a supplemental motion to dismiss. All of these motions were argued extensively before the District Court on May 17 and 18, 1971. All motions were overruled. Both Petitioners waived trial by jury. A trial was held on June 18, 1971, before the Court without a jury. The only evidence introduced was a stipulation which is identical to the other stipulation printed above on pages 6-8 of this Petition.

Petitioners, during the trial, renewed their motion to suppress evidence seized and the Court considered the arguments made in support of the motion on May 17 and 18, 1971, and in opposition thereto as having been made anew and considered, afterwards the Court overruled the motion. The motions to dismiss were likewise renewed and overruled and an additional ground was argued in support thereof, i.e., that the statute involved and the indictment based upon the statute also violated the defendants' constitutional rights guaranteed by the Fifth Amendment to the Constitution. The Petitioners then filed a written motion for judgment of acquittal. This motion was also overruled. The Petitioners Palmer and Hettich were found guilty and prosecuted this appeal from the judgments of June 18, 1971.

Petitioners timely appealed their convictions to the United States Court of Appeals for the Sixth Circuit. On March 31, 1972, the Sixth Circuit affirmed their convictions, and on May 30, 1972, that Court denied their petition for rehearing.

REASONS FOR GRANTING THE WRIT

I. The Constitutional Question Is of Importance in the Administration of Justice.

The question presented by this case is one which this Court should answer because it is of critical importance in the administration of criminal law. It resolves itself into a basic question of whether Congress, by legislative fiat, may predetermine facts that prove the existence of probable cause upon which a search warrant must issue for the offense defined in Sec. 1955(b)(1).

Does Congress have authority to legislate the facts that constitute probable cause for the issue of a search warrant for the offense defined in Title 18 U.S.C. 1955(a)? If so, then it must follow that contrary to what has traditionally been charged as a responsibility of the Court is now a matter of legislative discretion.

The judiciary is traditionally charged with responsibility of interpreting the Constitution. This act, if constitutional, establishes the authority to determine facts that are sufficient to establish the finding of probable cause for the issuance of the search warrant to be a legislative function and not a judicial function.

The Supreme Court has said that the Fourth Amendment's command rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities. *U. S.* v. *Wallace and Tiernan Co.*, 366 U. S. 793 (1949); *Trupiano* v. *U. S.*, 334 U. S. 699 (1948); *U. S.* v.

Lefkowitz, 285 U. S. 452 (1932). The same reasoning is applicable to the desirability of having magistrates rather than the legislature determine when searches and seizures are permissible and what limitation should be placed upon such activities.

A search warrant which literally complies with the terms of the statute is still subject to a determination of whether such facts establish the existence of probable cause as provided under the Fourth Amendment. *Schenks* v. *U. S.,* 2 F. 2d 185 (C.A. D.C. 1924); *Wagner* v. *U. S.,* 8 F. 2d 581 (C.A. 8 1925).

In *Schenks* v. *U. S. (supra),* on page 187 it is said:

> "The Constitution is paramount, and the courts will not permit the evasion of the Constitution by validating writs issued on sworn declarations, which literally comply with the terms of the statute, but which fail to establish probable cause, inasmuch as they state the facts on information and belief or state conclusions of fact or of law, instead of positively alleging the material facts." (Citing cases)

If Congress has the authority to itemize such facts which it may, by legislative decree, determine to be sufficient to establish the existence of probable cause, and that a warrant must issue upon such facts contained in a sworn affidavit, the judiciary then no longer has the function of determining the facts which may be sufficient to establish the finding of probable cause for the issuance of a search warrant.

The judiciary is traditionally charged with the responsibility of interpreting the Constitution. *C.I.R.* v.

Obear-Nester Glass Co., 217 F. 2d 56, 59 (C.A. 7, 1954), *Cert. Den.*, 348 U. S. 982, *Rehearing Denied*, 349 U. S. 948.

The Supreme Court, in the exercise of its supervisory power over the administration of criminal justice in the Federal Courts, has from the beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions. *Elkins* v. *U. S.*, 364 U. S. 206 (1960); *McNabb* v. *U. S.*, 318 U. S. 332 (1943).

One of the rules formulated by the Supreme Court, *Federal Rules Cr. Proc.* rule 41(c), 18 U.S.C., provides as follows:

> "A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. * * *"

The power of the federal courts extends to policing federal rules, governing searches and seizures, and making certain they are observed. *Rea* v. *U. S.*, 350 U. S. 214 (1956).

A determination that facts submitted sufficient to establish the finding of probable cause for the issuance of a search warrant is one exclusively for the court. *Levee* v. *U. S.*, 29 F. 2d 187 (C.A. 4, 1928); *Veeder* v. *U. S.*, 252 F. 414 (C.A. 7, 1918). It is a judicial func-

tion and cannot be delegated. *U. S.* v. *Kelih,* 272 F. 484 (D.C. Ill. 1921); *U. S.* v. *Harnich,* 289 F. 256 (D.C. Conn. 1922). Where the probable cause issue arises on a motion to suppress evidence which may be had before trial, the issue is a matter solely for determination by the court. *Simmons* v. *U. S.,* 206 F. 2d 427 (C.A. D.C. 1953).

All the powers entrusted in government, whether state or national, are divided into three grand departments—the executive, the legislative and the judicial. The powers confided to one of these departments by the Constitution, cannot be exercised by another. *Kilbourn* v. *Thompson,* 103 U. S. 191 (1881).

The standards for probable cause and its existence, as required by the Fourth Amendment of the United States Constitution, to justify the issuance of a search warrant, is a determination which must be made by the judicial branch of our government. The determination must be made from the language as it is contained in the Fourth Amendment and not from a determination of the existence of probable cause made by the legislative branch, as contained in the statute under question.

The courts alone have the responsibility of protecting the public from legislation which ignores fundamental law. *Sunbeam Corp.* v. *Richardson,* 144 F. Supp. 583 (D.C. Ky. 1957), Reversed, 243 F. 2d 501.

The books are replete with opinions holding that the United States Commissioner's judgment, when exercised, independent of external circumstances or standards, is conclusive unless it is arbitrarily ex-

ercised. *United States* v. *Jordan,* 349 F. 2d 107 (C.A. 6, 1965); *United States* v. *Gosser,* 339 F. 2d 102 (C.A. 6, 1964); *United States* v. *Nicholson,* 303 F. 2d 330 (C.A. 6, 1962), cert. denied, 371 U. S. 823; *Evans* v. *United States,* 242 F. 2d 534 (C.A. 6, 1957), cert. denied, 353 U. S. 976; *Merritt* v. *United States,* 249 F. 2d 19 (C.A. 6, 1957).

The violation of these petitioners' rights is based on the influence which Sec. 1955(c) exercised upon the Commissioner's freedom of judgment to determine whether the facts in the affidavits submitted to him constituted probable cause for issuing the search warrant, at issue in this action.

It is inconceivable that Congress, in enacting this legislation, intended for a magistrate to refuse to issue a warrant when the set of facts contained in the statute is included in the affidavit. Thus, if Sec. 1955(c) is unconstitutional, its very presence in the instant case has violated these petitioners' constitutional rights, and when the proper measure to test the validity of Sec. 1955(c) is applied, the fact that it is unconstitutional cannot be successfully disputed.

One of the leading cases on the subject of search and seizure for the purpose of showing the principle upon which the Fourth Amendment proceeds is *Boyd* v. *U. S.,* 116 U. S. 616 (1886).

In this opinion the Court said:

> "It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be *obsta principiis.* We have no doubt that

> the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law."

There can be no doubt of the general power and authority of Congress to establish a rule of evidence in making proof of one fact presumptive or *prima facie* evidence of another. There is, however, a grave distinction to be drawn between the presumptions created by Congress, which are applicable to facts before a jury, and presumptions which are designed to take the place of facts in the determination of issues involving life, liberty or property, guaranteed under the Bill of Rights.

Section 1955(c) does not establish a rule of evidence making proof of the facts as stated therein presumptive of another fact subject to rebuttal. It establishes a rule of substantive law. The use of the word "deemed" in the Act creates an irrebuttable presumption, a rule of substantive law that probable cause has been established, upon presentation of the facts therein stated. It is an obvious invasion of the judicial function of the courts. Congress cannot alter the Defendants' constitutional protection contained in the Fourth, Fifth and Fourteenth Amendments, and as provided in Cr. Proc. Rule 41(c), 18 U.S.C., by creating, through the enactment of a statute, its determination of the facts required to establish reasonable grounds or probable cause of the offenses described.

A constitutional prohibition cannot be transgressed indirectly by creation of a statutory presumption any more than it can be violated by direct enactment, and the power to create presumptions is not a means of escape from constitutional restrictions. *Speiser* v. *Randall,* 357 U. S. 513 (1958), rehearing denied, 358 U. S. 860; *Prince* v. *City & County of San Francisco,* 358 U. S. 860 (1958); *First Unitarian Church of Los Angeles* v. *Los Angeles County,* 357 U. S. 545 (1958).

II. 18 U.S.C., Sec. 1955 Is an Unconstitutional Delegation of Legislative Power and Is in Violation of Article 1 of the United States Constitution.

Historically the courts of this nation have upheld and confirmed the constitutional mandate that Congress is the exclusive substantive lawmaking body for the federal government. *Wayman* v. *Southard,* 23 U. S. 42 (Ky. 1825). The court early recognized this principle and stated on page 264 of the Law Edition Reporter as follows:

> "The state assemblies do not constitute a legislative body for the union. They possess no portion of that legislative power which the constitution vests in Congress, and cannot receive it by delegation."

In *Moore* v. *Allen,* 3 J. J. Marshall (Ky. 1830), the Court stated that the United States Congress cannot, within the Constitution, vest the state legislatures with power to prescribe laws, rules, and regulations for the government of the federal courts or the offices of the

(1891); *Field* v. *Clark*, 143 U. S. 649; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 214 (1912).

CONCLUSION

By stipulation entered into by the Petitioners and their counsel, and the counsel for Respondent, United States of America, it provided, among other things, the Petitioners could retain the right to contend that all evidence obtained by the search warrant was obtained illegally and in violation of the Petitioners' rights under the Fourth Amendment of the United States of America.

If Section 1955(c) is unconstitutional, the search warrants issued in this action under the probable cause provision contained therein, are invalid, and the admission of all evidence secured thereby was error and should have been excluded.

WHEREFORE, we respectfully request that this petition for writ of certiorari be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

Nos. 71-1596 and 71-1597

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
RAY PALMER,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
RAY PALMER and MAURICE ROBERT HETTICH,
Defendants-Appellants.

APPEAL from the United States District Court for the Western District of Kentucky.

UNREPORTED OPINION—Decided and Filed March 31, 1972.

Before TOM C. CLARK, Associate Justice,* JOHN W. PECK and W. WALLACE KENT, Circuit Judges.

PER CURIAM. The Defendants Appellants, Palmer and Hettich, and others not involved here, were charged with violations of 13 U.S.C. § 1955, which prohibits the operation of an illegal gambling business. To constitute an offense under this Section, the gambling business must violate a relevant state or local law, have five or more persons involved in its conduct and be in substantial, continuous operation for more than thirty days or have a gross revenue

*Associate Justice of the Supreme Court of the United States, Retired, sitting by designation.

of $2,000 or more in one single day. Section 1955 (c) further provides that for the purpose of securing warrants "probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established" if five or more persons conduct such business and it operates for two or more successive days. Appellants conducted their business at two separate locations in Louisville, Kentucky, and search warrants were issued covering both addresses. The affidavit supporting the search of the location on Fifteenth Street recited that five or more persons were involved in its conduct and that it had been in substantial, continuous operation exceeding thirty days. However, the affidavit supporting the Nineteenth Street search recited that five or more persons were engaged in its conduct but only on two successive days. The affidavit relied on the presumption of § 1955 (c) aforesaid. Appellants' primary position is that § 1955 (c) is unconstitutional as violative of both the Fourth and Fifth Amendments and that the affidavit in question is not factually sufficient. Other contentions are that the five persons alleged in the affidavits as conducting the gambling business include employees; that § 1955 is hinged on state law, is an unlawful delegation of congressional power and denies equal protection of the law and that the admixture of § 1955 and the Kentucky gambling laws renders the latter unconstitutional in that the Kentucky Constitution provides that no law "shall be enacted to take effect upon the approval of any authority other than its General Assembly." We find no substance in any of these contentions.

Appellants recognize that Congress has the power to provide in a criminal statute that proof of one fact shall constitute presumptive or prima facie evidence of another. The requirement of a rational connection between the fact proved and the fact presumed was the crucial due process test established in *Tot* v. *United States*, 319 U. S. 463

(1943). Also see *Leary* v. *United States*, 395 U. S. 6, 36 (1969); *United States* v. *Gainey*, 380 U. S. 63 (1965); *Perez* v. *United States*, 402 U. S. 146 (1971). The extensive hearings before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary 91 Congress, 1st Session, on S. 30 and other bills which culminated in the Organized Crime Control Act of 1970 clearly reveal that "in most or all" of the cases involving raids of gambling establishments, the records seized reflected revenues of these establishments to be "better than $2,000 a day." Report of the Senate Committee on the Judiciary S. R. 91-617, page 400. From these and other available statistics indicating revenues received by such gambling businesses, the Congress could reasonably conclude that a gambling operation with five or more participants doing business for two consecutive days would reap at least $2,000 in revenues in a single day. See 116 Cong. Rec. 603-604. We conclude that this is a permissible inference.

Appellants also contend that § 1955 (c) creates an irrebuttable presumption that if five or more persons are conducting the business condemned and such business operates for two or more successive days, probable cause is established. The Government answers that there is no irrebuttable presumption in the act and we find none. The Appellants were at liberty to rebut the presumption but elected not to do so. The claim therefore has no merit. Appellants' other contentions are equally without merit. They urge that the five persons engaged in their business were employees and could not be included among those who "conduct, finance, manage, supervise, direct or own all or part of such business . . ." However the Sentate Committee Report on the Act specifically states that the term "conduct" refers to both "high level bosses and street level employees." Nor will the contention that the Federal crime hinges on state law and is therefore an unconstitutional

delegation of congressional authority stand scrutiny. It was directly rejected in *United States* v. *Compton*, 365 Fed. 2d 1 (6 Cir. 1966), involving the phrase "unlawful activity" in 18 USC § 1952, which employs the same technique as used in § 1955. Also see *United States* v. *Nardello*, 393 U. S. 286 (1969) which implicitly approved this procedure. Finally, we conclude that Appellants' contention that § 1955 requires that Federal gambling laws enacted by the Kentucky Legislature take effect only upon the approval of the Congress is entirely frivolous. The relevant Kentucky laws were enacted long prior to § 1955 and insofar as Kentucky law is concerned, the latter has no effect whatever upon their enforcement in Kentucky courts.

AFFIRMED.

ORDER—Filed May 30, 1972

Before: PECK, Circuit Judge, CLARK, Associate Justice, and KENT, Circuit Judge.

Upon consideration of Appellant's petition for rehearing, it is ordered that the petition be and it hereby is denied.

ENTERED BY ORDER OF THE COURT.

/s/ JAMES A. HIGGINS
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-2

RAY PALMER AND MAURICE ROBERT HETTICH,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is unreported (Pet. App.).

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1972. A petition for rehearing was denied on May 30, 1972. The petition for a writ of certiorari was filed on June 29, 1972. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the inference contained in 18 U.S.C. 1955(c) that there is probable cause to believe that one element of an offense exists where certain other elements are shown violates petitioners' Fourth Amendment rights.

2. Whether 18 U.S.C. 1955 is an unconstitutional delegation of power to the States.

STATUTE INVOLVED

18 U.S.C. 1955 provides in pertinent part as follows:

> § 1955. Prohibition of illegal gambling businesses.
>
> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section—
>
> (1) "illegal gambling business" means a gambling business which—
>
> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, book making, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita, or numbers games or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenues in excess of $2,000 in any single day shall be deemed to have been established.

* * * *

STATEMENT

After a jury-waived trial in the United States District Court for the Western District of Kentucky, petitioners were convicted on charges of operating an illegal gambling business in violation of 18 U.S.C. 1955. Petitioner Palmer was fined $7500 and sentenced to imprisonment for a year and a day for each of two violations, the sentences to run concurrently. He was ordered to serve six months of the sentence and was placed on three years' probation for

the balance. Petitioner Hettich was also sentenced to a year and a day for a single violation, with all but 30 days suspended. He was placed on probation for three years. The court of appeals affirmed (Pet. App. 21-24).

Petitioners were suspected of involvement in illegal gambling operations at two locations in Louisville, Kentucky, in violation of state law and of 18 U.S.C. 1955. Search warrants were obtained covering the two premises. The affidavit supporting the search at one of them recited that five or more persons were involved in the conduct of a gambling business that had been in substantially continuous operation for more than 30 days. The affidavit supporting the search of the other premises stated that five or more persons were engaged in the conduct of a gambling business there, on two successive days. With respect to the statutory element of the offense concerning the dollar volume of operations, the affidavit relied on the presumption of Section 1955(c), which provides that where the two aforementioned conditions (five or more persons on two successive days) exist, "probable cause that the business receives gross revenues in excess of $2,000 in any single day shall be deemed to have been established."

At trial, the sole defense raised involved the legality of the search and the constitutionality of the statute. Petitioners and the government stipulated that the allegations contained in the indictment were to be considered by the trial court as the evidence in the case (Pet. 6-8). Pursuant to this stipulation, all

of the elements of the offense specified in 18 U.S.C. 1955 were established.

ARGUMENT

1. Petitioners first attack the constitutionality of the presumption contained in Section 1955(c), arguing that it usurps the magistrate's function of exercising independent fact-finding judgment before issuing a search warrant. The cases relied upon in support of this argument, however, address a vice that is not present in this instance—action by law enforcement officers without an independent review of the basis therefor by a neutral and detached magistrate. See *Coolidge* v. *New Hampshire*, 403 U.S. 443, 449-453. The inference authorized by Section 1955(c), being based upon a determination by Congress following extensive hearings, does not present the risks inherent in determinations of probable cause by possibly over-zealous and biased law enforcement officials.

Thus, the issue should properly be analyzed in terms of the harmony between use of the presumption and the Fourth Amendment's requirements that searches and seizures be reasonable and be based upon a showing of probable cause. The inference being drawn under the statute is that where five or more persons conduct a gambling operation for two or more successive days, it is *probable* that gross revenues in excess of $2,000 have been received in a single day. There was a solid factual foundation for this congressionally established inference. The extensive Hearings Before the Subcommittee on Criminal Laws and

Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., on S. 30 and related bills, which culminated in the Organized Crime Control Act of 1970, clearly reveal that in almost all of the cases involving raids of gambling establishments, the records seized reflected revenues of these establishments to be "better than $2,000 a day" (*id.* at 400). From this and other information and statistics available to it (see 116 Cong. Rec. 603-604), Congress reasonably concluded that a gambling operation with five or more participants doing business for two consecutive days would probably reap at least $2,000 in revenues in a single day.[1] The inference to which petitioners object thus flows rationally from the facts required to be established as a condition precedent to its invocation. Moreover, the congressional determination that probable cause is shown where application for a warrant is based upon the involvement of five or more persons in a gambling business for two or more successive days does not usurp the function of the magistrate, since he must still determine in each particular case whether the essential facts giving rise to the inference are present.

The inference contained in Section 1955(c) would, we submit, satisfy the rational connection test for use of statutory presumptions in trial of guilt or inno-

---

[1] The reasonableness of the congressional findings underlying the enactment of Section 1955 has also been upheld by two other courts of appeals. *United States* v. *Harris*, No. 71-3586, C.A. 5, decided May 22, 1972; *United States* v. *Riehl*, Nos. 71-2133 - 71-2135, C.A. 3, decided May 9, 1972.

cence. See *Tot* v. *United States*, 319 U.S. 463, 467; *Turner* v. *United States*, 396 U.S. 398; *Leary* v. *United States*, 395 U.S. 6; *United States* v. *Gainey*, 380 U.S. 63; *Perez* v. *United States*, 402 U.S. 146. Since less is required to establish probable cause than to prove guilt, *Brinegar* v. *United States*, 338 U.S. 160, 173-175, it would be inappropriate to strike down a reasonable probable cause presumption that would be upheld if utilized for the purpose of establishing guilt.[2]

Petitioners argue that the presumption is impermissible because, unlike presumptions applied in a trial, it is as a practical matter irrebuttable (Pet. 16). This contention proceeds from a faulty premise regarding the nature of the probable cause inquiry (which is, of course, *ex parte*) as distinct from a trial. To prove guilt, each statutory element of the offense must be established beyond a reasonable doubt; to obtain a warrant, all that is required is a showing of probable cause, and it does not matter that it is later shown that the probability was not a reality or, indeed, even that it is shown that the information

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[2] At trial, the burden remains upon the government to establish that an illegal gambling enterprise with five or more members either has operated continuously for thirty days, or has had a gross revenue of $2,000 in a single day. The government cannot rely upon the probable cause presumption to satisfy the requirement of proof beyond a reasonable doubt. See Report of the Senate Committee on the Judiciary, S. Rep. No. 91-617, 91st Cong., 1st Sess., p. 156; and Hearings, *supra*, at 401. The statutory presumption is in terms applicable only to probable cause "for arrests, interceptions, and other searches and seizures * * *."

upon which issuance of the warrant was predicated was inaccurate. *United States* v. *Sultan*, No. 72-1114, C.A. 2, decided July 5, 1972; *United States* v. *Perry*, 380 F.2d 356, 358 (C.A. 2), certiorari denied, 389 U.S. 943. Where, as here, the inferred fact is probable given the required underlying facts, there is actual probable cause; there is therefore nothing to rebut.

2. Petitioners' contention that Section 1955 is an unconstitutional delegation of congressional power to the states is without substance. It is settled that Congress may incorporate state criminal laws in federal criminal statutes by reference. *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604, 616; *Currin* v. *Wallace*, 306 U.S. 1, 14; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U.S. 311, 326-327; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U.S. 334, 351-352; *Nilva* v. *United States*, 212 F.2d 115, 119 (C.A. 8), certiorari denied, 348 U.S. 825. See also *United States* v. *Sharpnack*, 355 U.S. 286, upholding 18 U.S.C. 13, the Assimilative Crimes Act, which makes applicable to a federal enclave subsequently enacted criminal laws of the State in which the enclave is situated.

Moreover, the fact that a federal criminal statute is based in part upon conduct proscribed by state law does not create a violation of due process simply because of variations in the law of the several states. See, *e.g.*, *Spinelli* v. *United States*, 382 F.2d 871, 890 (C.A. 8), reversed on other grounds, 393 U.S. 410 (upholding 18 U.S.C. 1952, which prohibits traveling

in interstate commerce to promote certain illegal activity, including gambling, that violates the laws of the State in which it occurs); *Turf Center, Inc.* v. *United States*, 325 F.2d 793, 795-796 (C.A. 9); *United States* v. *Phillips*, 433 F.2d 1364 (C.A. 8), certiorari denied, 401 U.S. 917; *United States* v. *Schwartz*, 398 F.2d 464, 467 (C.A. 7), certiorari denied *sub nom. Pyne* v. *United States*, 393 U.S. 1062.[3] See, also, *United States* v. *Nardello*, 393 U.S. 286.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

JEROME M. FEIT,
EUGENE M. PROPPER,
Attorneys.

AUGUST 1972.

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[3] This precise claim of petitioners regarding delegation of congressional authority to the states in 18 U.S.C. 1955 has also been rejected in *Schneider* v. *United States*, Nos. 71-1393, 71-1572 C.A. 8, decided April 12, 1972, and *United States* v. *Aquino*, 336 F. Supp. 737 (E.D. Mich.) In addition, the following cases have sustained 18 U.S.C. 1955 against general constitutional attacks: *United States* v. *Harris*, No. 71-3586, C.A. 5, decided May 22, 1972; *United States* v. *Riehl*, Nos. 71-2133 - 71-2135, C.A. 3, decided May 9, 1972; *United States* v. *Becker*, No. 72-1105, C.A. 2, decided May 30, 1972.

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Supreme Court Of The United States

October Term 1972
No. 72-2

RAY PALMER - - - - - - - - Petitioner

versus

UNITED STATES OF AMERICA - Respondent

AND

RAY PALMER and
MAURICE ROBERT HETTICH - - - Petitioners

versus

UNITED STATES OF AMERICA - Respondent

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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LAWYERS PRINTING COMPANY LOUISVILLE KENTUCKY

SUPREME COURT OF THE UNITED STATES

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No. 72-2

RAY PALMER - - - - - - - - *Petitioner*

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versus

UNITED STATES OF AMERICA - - -*Respondent*

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner respectfully requests that this Court grant rehearing of its order dated October 9, 1972, which denied certiorari, and that the Court now grant certiorari.

The petition for certiorari previously filed herein presented the question whether the legislative branch can violate the petitioner's Fourth Amendment rights by prescribing in 18 U.S.C. §1955 the elements necessary to establish a conclusive presumption of

probable cause to issue a search warrant. The petition for certiorari discussed the importance of the question presented by the Sixth Circuit's decision in this case and its impact upon the administration of justice in the federal courts.

Petitioners feel their ineptness may have caused the Court to misapprehend the question presented in their petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. It is with considered deliberation that we urge upon this Court the seriousness of the question presented for its consideration.

If Congress can, by legislative decree, establish an inference which supplies one element of an offense that mandatorily requires the issuance of a search warrant, if other elements are shown, it will destroy the Fourth Amendment rights which protects the security of people, their homes and businesses, subject only to the discretion of the United States Congress. It will eliminate what has historically been considered a constitutional requirement that inferences to support a search warrant must be drawn by neutral and detached magistrates.

This Court has written in no uncertain terms that the requirement of a search warrant includes the necessity that inferences to support search must be drawn by a neutral and detached magistrate instead of being judged by officers in the often competitive enterprise of ferreting out crime. Surrender by the judiciary of citizens' Fourth Amendment rights to the United States Congress or to law enforcement agencies is of great significance.

Mr. Justice Jackson writing for the Court stated in *Johnson* v. *United States*, 333 U.S. 10, 13-14:

"The point of the 4th Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. * * * When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or a government enforcement agent."

CONCLUSION

As referred to *Johnson* v. *United States*, supra, the protection of the Fourth Amendment requires that those inferences which reasonable men draw from evidence must be drawn by a neutral and detached magistrate and cannot be judged by an officer engaged in the often competitive enterprise of ferreting out crime.

Congress cannot maintain the requisite neutrality to make a determination of whether there is probable cause to issue a search warrant, based upon its congressional investigation in gathering facts for the purpose of enacting legislation. *Coolidge* v. *New Hampshire*, 403 U.S. 443.

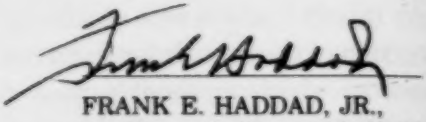
When the judiciary surrenders to Congress its power to protect the people under the Fourth Amendment, it matters little whether the surrender is to the Congress or to law enforcement agencies.

WHEREFORE, the Petitioners respectfully request that this Court grant a rehearing on their petition and issue a writ of certiorari to the Sixth Circuit Court of Appeals in this action.

FRANK E. HADDAD, JR.
529 Kentucky Home Life Building
Louisville, Kentucky 40202
Counsel for Petitioners

CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in paragraph 2 of Rule 58.



FRANK E. HADDAD, JR.,
529 Kentucky Home Life Building
Louisville, Kentucky 40202
Counsel for Petitioner

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Supreme Court Of The United States

October Term 1972
No. 72-2

RAY PALMER - - - - - - - - Petitioner

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RAY PALMER and
MAURICE ROBERT HETTICH - - - Petitioners

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UNITED STATES OF AMERICA - Respondent

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

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SUPREME COURT OF THE UNITED STATES

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versus

UNITED STATES OF AMERICA - - -*Respondent*

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

Petitioners respectfully move for leave to file annexed petition for rehearing of the order of this Court denying the petition for Writ of Certiorari in this case, entered on October 10, 1972.

Petitioners had twenty-five (25) days from October 10, 1972, within which to file a petition for rehearing of the order denying the petition for Writ of Certiorari or up to and including November 4, 1972. Because of illness of counsel, he was unable to certify and mail the petition for rehearing until Saturday, November 4, 1972.

The petition arrived on November 5, 1972, 10½ hours after the time due. The petition for rehearing complies with all the requirements of the rules of this Court and presents an important and vital question of constitutional law.

Although this petition for rehearing is filed after the time prescribed in Rule 58 (2), this Court, clearly has power, in its discretion and in the interest of justice, to entertain the petition in these circumstances.

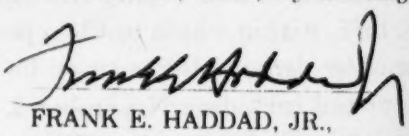
The Petitioners respectfully request the Court to grant leave to file the attached petition for rehearing of its order denying certiorari.

Respectfully submitted,

FRANK E. HADDAD, JR.
529 Kentucky Home Life Building
Louisville, Kentucky 40202
Counsel for Petitioners

CERTIFICATE OF SERVICE

This is to certify that three copies of this Motion and the attached petition for rehearing of order denying certiorari have been served on the Honorable Erwin Griswold, Solicitor General of the United States of America, this 9th day of November, 1972, by mailing same to him airmail.



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